

Cornell Motion for Summary Judgment Exhibit 35

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
NO. 16-cv-6525-PKC

CASEY CUNNINGHAM,)
Plaintiff,)
vs.)
CORNELL UNIVERSITY, ET AL.,)
Defendants.)

VIDEOTAPED DEPOSITION OF FIDELITY
MANAGEMENT TRUST COMPANY LLP BY PATRICK T. WARNER,
called as a witness by and on behalf of the
Plaintiff, pursuant to the applicable provisions of
the Federal Rules of Civil Procedure, Rule
30(b)(6), before P. Jodi Ohnemus, RPR, RMR, CRR,
CA-CSR #13192, NH-LSR #91, MA-CSR #123193, and
Notary Public, within and for the Commonwealth of
Massachusetts, at the offices of Goodwin Procter,
100 Northern Avenue, Boston, Massachusetts, on
Friday, July 20, 2018, commencing at 9:02 a.m.

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<p style="text-align: right;">Page 102</p> <p>1 Q. As of this date in -- you said June 15th, 2 2011; is that correct for this agreement -- 3 A. That's the -- 4 Q. -- we're looking at? 5 A. Dated as of June 15th, 2011. 6 Q. Was it possible for Fidelity to have 7 entered into the fixed arrangement that you're 8 describing with a limited -- per-participant limit 9 in recordkeeping fees? 10 MR. MYLER: Objection to form. 11 MR. FELDMAN: Join the objection. 12 MR. BOYLE: Vague. 13 A. I don't recall timing of when the 14 different models at Fidelity were available. 15 Q. So as of this date, you're not familiar 16 with any arrangements that Fidelity had that were 17 in a fixed arrangement, as we described? 18 A. So I'm not sure in 2011. 19 Q. So you have -- you have no familiarity 20 with any arrangement of a fixed nature that we 21 discussed? 22 A. No, I didn't say that. 23 You said as of 2011. 24 Q. As of 2011. Sorry. I should have</p>	<p style="text-align: right;">Page 104</p> <p>1 implemented by Fidelity? 2 A. So I work at -- like I said before, I work 3 in the tax exempt market and fixed arrangements in 4 the tax exempt market were not common until 5 probably the last five -- actually, what year -- so 6 the last probably five to six years. 7 Q. Would you say that -- 8 A. And -- 9 Q. -- as of the last five or six years they 10 have become common? 11 A. I would say they are more common, but I 12 would say that, in today's world, my understanding 13 in our tax exempt market, we're still 90 -- 90-plus 14 percent clients in a bundled arrangement. 15 Q. You described that you work in the tax 16 exempt market, but you alluded to another market 17 that exists in the defined contribution space -- I 18 believe -- would that be the 401(k) market? 19 A. I did -- I -- when did I allude to that? 20 Q. Well, you said you work in the tax exempt 21 market; is that correct? 22 A. Yeah. 23 Q. You're distinguishing between -- is there 24 another market that exists?</p>
<p style="text-align: right;">Page 103</p> <p>1 limited -- 2 A. So as of 2011, I didn't have any clients 3 that had a fixed arrangement with Fidelity, and I 4 don't know the pricing of other clients outside of 5 my own book. They don't -- Fidelity doesn't share 6 that information with us. 7 Q. Okay. If a client had approached you in 8 2011 and requested a per-participant limit, could 9 that have been possible? 10 MR. MYLER: Object to form. 11 MR. BOYLE: Vague. 12 MR. FELDMAN: Objection. Hypothetical. 13 A. So was fixed pricing in place in 2011? 14 Q. Yes. 15 A. I honestly don't know the exact date 16 when -- when -- when our -- when fixed pricing 17 became available. It was sometime in the last 18 -- it was at least five years ago, but I'm not sure 19 if it was 2011. 20 Q. So you don't -- 21 A. I don't -- I don't think it was. 22 Q. So you, having worked in this space for 23 multiple decades, do not have any knowledge as to 24 approximately what year fixed fee arrangements were</p>	<p style="text-align: right;">Page 105</p> <p>1 A. So Fidelity provides retirement plan 2 services to all types of companies. 3 Q. Including 401(k) plans? 4 A. Yes, and, I -- I mean, some of my clients 5 have 401Ks that are tax exempt. 6 Q. Okay. Are you familiar with the fixed fee 7 arrangements and practice in 401(k) models that 8 Fidelity offers? 9 MR. BOYLE: Objection. Scope. 10 A. Yeah, I don't know what -- so -- so like I 11 said, I have clients that have 401(k) plans. 12 So are you asking me the corporate side of 13 Fidelity? 14 Q. Yes. 15 A. So I'm not familiar with the corporate 16 side of Fidelity. Again, I -- I said before, 17 Fidelity shares with us, you know, pricing models 18 that are available. So I can't recall exactly 19 when, you know, our finance team reviewed fixed 20 options with us -- 21 Q. And you're not able to approximate when 22 that was implemented, even within a year or a 23 couple of years? 24 MR. BOYLE: In tax exempt?</p>

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<p style="text-align: right;">Page 378</p> <p>1 custodian discontinue communications related to 2 personal guidance offerings, if they don't do so, 3 and if Fidelity -- sorry -- if Cornell doesn't do 4 so, then the practices will continue and Fidelity 5 will engage and use that information to send out 6 that personal guidance offering. 7 MR. MYLER: Object to form. 8 MR. BOYLE: Vague. 9 A. Through our -- through our Plan For Life 10 communication program, we will send out educational 11 components to participants based on their personal 12 situation or life stage that Cornell has given us 13 authority to do and, then, has the chance to opt 14 out of any individual one. 15 Q. Okay. So there's only two ways that the 16 participant -- or that that communication could be 17 stopped: The -- Cornell says that you can't do it, 18 or participant opts out under this clause. 19 Is that consistent with your 20 understanding? 21 MR. MYLER: Object to form. 22 A. So it's coming -- all of this is coming 23 from us in the Workplace investing side. So it's 24 nothing that our retail folks are getting and</p>	<p style="text-align: right;">Page 380</p> <p>1 MR. MYLER: Cornell has no questions. And 2 we'd note that our production included a number of 3 communications between Cornell and Fidelity. I 4 won't estimate the volume, but a significant number 5 of documents. 6 MR. FELDMAN: As did, I believe, CAPTRUST 7 information. 8 MR. BOYLE: Respondents will read and 9 sign. 10 MR. HATCH: As will plaintiffs. 11 VIDEO OPERATOR: The time is 4:55, this is 12 the end of DVD No. 4, as well as the deposition, 13 and we are now off the record. 14 (Whereupon the deposition recessed at 15 4:54 p.m.) 16 17 18 19 20 21 22 23 24</p>
<p style="text-align: right;">Page 379</p> <p>1 sending to participants. 2 So Cornell can opt out at any point, and 3 if a participant -- Cornell doesn't opt out and a 4 participant called in and said, I don't want to 5 receive these anymore, then they would flag that 6 participant's account to not receive those pieces 7 going forward. 8 MR. HATCH: Okay. I think that's all I 9 have in terms of questions. I will say -- and I'd 10 like to state for the record that the plaintiffs 11 will be holding this deposition open because of, in 12 this case, the production of, to date, only 21 13 documents by Fidelity. 14 And so subject to meeting and conferring 15 and addressing what we believe to be a materially 16 deficient production, we are holding the deposition 17 open. 18 MR. FELDMAN: CAPTRUST has no questions. 19 CAPTRUST disagrees with that stipulation. 20 MR. BOYLE: Yes. I'll say for the 21 respondents that we obviously disagree. We've made 22 our position clear throughout, and obviously 23 understand that plaintiffs need to reserve their 24 rights and do as they wish.</p>	<p style="text-align: right;">Page 381</p> <p>1 Commonwealth of Massachusetts 2 Middlesex, ss. 3 4 5 I, P. Jodi Ohnemus, Notary Public 6 in and for the Commonwealth of Massachusetts, 7 do hereby certify that there came before me 8 on the 20th day of July, 2018, the deponent herein, 9 who was duly sworn by me; that the ensuing 10 examination upon oath of the said deponent was 11 reported stenographically by me and transcribed 12 into typewriting under my direction and control; 13 and that the within transcript is a true record of 14 the questions asked and answers given at said 15 deposition. 16 17 I FURTHER CERTIFY that I am neither 18 attorney nor counsel for, nor related to or 19 employed by any of the parties to the action 20 in which this deposition is taken; and, further, 21 that I am not a relative or employee of any 22 attorney or financially interested in the outcome 23 of the action. 24 25 IN WITNESS WHEREOF I have hereunto set my 26 hand and affixed my seal of office this 27 24th day of July, 2018, at Waltham. 28 29 _____ 30 31 P. Jodi Ohnemus, RPR, RMR, CRR 32 CSR, Notary Public, 33 Commonwealth 34 of Massachusetts 35 My Commission Expires: 36 3/14/2021 37 38 39 40</p>

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<p style="text-align: right;">Page 382</p> <p>1 Veritext Legal Solutions 1100 Superior Ave 2 Suite 1820 3 Cleveland, Ohio 44114 4 Phone: 216-523-1313</p> <p>5 July 24, 2018</p> <p>6 To: Brian Boyle, Esq.</p> <p>7 Case Name: Cunningham, Casey v. Cornell University, et al.</p> <p>8 Veritext Reference Number: 2966722</p> <p>9 Witness: Patrick T. Warner Deposition Date: 7/20/2018</p> <p>10 Dear Sir/Madam:</p> <p>11 Enclosed please find a deposition transcript. Please have the witness</p> <p>12 review the transcript and note any changes or corrections on the</p> <p>13 included errata sheet, indicating the page, line number, change, and</p> <p>14 the reason for the change. Have the witness' signature notarized and</p> <p>15 forward the completed page(s) back to us at the Production address</p> <p>16 shown</p> <p>17 above, or email to production-midwest@veritext.com.</p> <p>18 If the errata is not returned within thirty days of your receipt of</p> <p>19 this letter, the reading and signing will be deemed waived.</p> <p>20</p> <p>21 Sincerely,</p> <p>22 Production Department</p> <p>23</p> <p>24 NO NOTARY REQUIRED IN CA</p>	<p style="text-align: right;">Page 384</p> <p>1 DEPOSITION REVIEW CERTIFICATION OF WITNESS</p> <p>2</p> <p>3 ASSIGNMENT REFERENCE NO: 2966722 CASE NAME: Cunningham, Casey v. Cornell University DATE OF DEPOSITION: 7/20/2018 WITNESS' NAME: Patrick T. Warner</p> <p>4 In accordance with the Rules of Civil 5 Procedure, I have read the entire transcript of 6 my testimony or it has been read to me.</p> <p>7 I have listed my changes on the attached 8 Errata Sheet, listing page and line numbers as 9 well as the reason(s) for the change(s).</p> <p>10 I request that these changes be entered 11 as part of the record of my testimony.</p> <p>12</p> <p>13 I have executed the Errata Sheet, as well 14 as this Certificate, and request and authorize 15 that both be appended to the transcript of my 16 testimony and be incorporated therein.</p> <p>17</p> <p>18 Date Patrick T. Warner</p> <p>19</p> <p>20 Sworn to and subscribed before me, a 21 Notary Public in and for the State and County, 22 the referenced witness did personally appear 23 and acknowledge that:</p> <p>24 They have read the transcript; 25 They have listed all of their corrections in the appended Errata Sheet; They signed the foregoing Sworn Statement; and Their execution of this Statement is of their free act and deed.</p> <p>I have affixed my name and official seal this ____ day of _____, 20____.</p> <p>Notary Public</p> <p>Commission Expiration Date</p>
<p style="text-align: right;">Page 383</p> <p>1 DEPOSITION REVIEW CERTIFICATION OF WITNESS</p> <p>2</p> <p>3 ASSIGNMENT REFERENCE NO: 2966722 CASE NAME: Cunningham, Casey v. Cornell University DATE OF DEPOSITION: 7/20/2018 WITNESS' NAME: Patrick T. Warner</p> <p>4 In accordance with the Rules of Civil 5 Procedure, I have read the entire transcript of 6 my testimony or it has been read to me.</p> <p>7 I have made no changes to the testimony 8 as transcribed by the court reporter.</p> <p>9</p> <p>10 Date Patrick T. Warner</p> <p>11 Sworn to and subscribed before me, a 12 Notary Public in and for the State and County, 13 the referenced witness did personally appear 14 and acknowledge that:</p> <p>15 They have read the transcript; 16 They signed the foregoing Sworn 17 Statement; and 18 Their execution of this Statement is of 19 their free act and deed.</p> <p>20 I have affixed my name and official seal 21 this ____ day of _____, 20____.</p> <p>22</p> <p>23 Notary Public</p> <p>24 Commission Expiration Date</p> <p>25</p>	<p style="text-align: right;">Page 385</p> <p>1 ERRATA SHEET VERITEXT LEGAL SOLUTIONS MIDWEST</p> <p>2 ASSIGNMENT NO: 7/20/2018</p> <p>3 PAGE/LINE(S) / CHANGE /REASON</p> <p>4 _____</p> <p>5 _____</p> <p>6 _____</p> <p>7 _____</p> <p>8 _____</p> <p>9 _____</p> <p>10 _____</p> <p>11 _____</p> <p>12 _____</p> <p>13 _____</p> <p>14 _____</p> <p>15 _____</p> <p>16 _____</p> <p>17 _____</p> <p>18 _____</p> <p>19 _____</p> <p>20</p> <p>21 Date Patrick T. Warner</p> <p>22 SUBSCRIBED AND SWORN TO BEFORE ME THIS _____</p> <p>23 DAY OF _____, 20____.</p> <p>24</p> <p>25 Notary Public</p> <p>Commission Expiration Date</p>

1 Commonwealth of Massachusetts

2 Middlesex, ss.

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5 I, P. Jodi Ohnemus, Notary Public
6 in and for the Commonwealth of Massachusetts,
7 do hereby certify that there came before me
8 on the 20th day of July, 2018, the deponent herein,
9 who was duly sworn by me; that the ensuing
10 examination upon oath of the said deponent was
11 reported stenographically by me and transcribed
12 into typewriting under my direction and control;
13 and that the within transcript is a true record of
14 the questions asked and answers given at said
15 deposition.

10

11 I FURTHER CERTIFY that I am neither
12 attorney nor counsel for, nor related to or
13 employed by any of the parties to the action
14 in which this deposition is taken; and, further,
15 that I am not a relative or employee of any
16 attorney or financially interested in the outcome
17 of the action.

15

16 IN WITNESS WHEREOF I have hereunto set my
17 hand and affixed my seal of office this
18 24th day of July, 2018, at Waltham.

17

18 P. Jodi Ohnemus

19

20 P. Jodi Ohnemus, RPR, RMR, CRR
21 CSR, Notary Public,
22 Commonwealth
23 of Massachusetts
24 My Commission Expires:
3/14/2021